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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1006

JOE LEWIS and
TOMMY ALLEN COMBS ..... PETITIONERS

v.

UNITED STATES
OF AMERICA ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered therein on the 8th day of October, 1974.

Petition for Rehearing was denied on the 15th day of January, 1975.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported in 504 F.2d (No. 2) 92, 104 and appears in the appendix hereto. This opinion affirmed a judgment of conviction of petitioners for possession of stolen explosives in violation of 18 U.S.C. §842(h).

Petitioners were tried by jury in the Pikeville Division of the United States District Court for the Eastern District of Kentucky, and given four-year sentences.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 8, 1974. Petition for Rehearing was denied on January 15, 1975.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. **Was the initial search and seizure purely a state matter under the requirements of the Tenth Amendment to the United States Constitution and Rule 19 (1) (b) of this Court, therefore requiring the Court's adherence to the decision of the Court of Appeals of Kentucky in the case of Combs and Lewis v. Commonwealth of Kentucky, Ky. 516 S.W.2d 105?**

II. Were petitioners' Sixth Amendment rights violated in not trying their case at the Jackson Division of the Court?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four: United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment Six: United States Constitution

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Amendment Ten: United States Constitution

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Section 10: Constitution of Commonwealth of Kentucky

> Search warrants; seizure of person; provisions concerning — The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

STATUTES AND RULES INVOLVED

28 USC, §97(a):

> "The Eastern District comprises the counties of Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe, and Woodford.
>
> Court for the Eastern District shall be held at Catlettsburg, Covington, Frankfort, Jackson, Lexington, London, Pikeville, and Richmond."

28 USC, §1861:

> "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . .".

18 USC, §3240:

> "Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been transferred, unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial."

FRCP, Rule 18:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

STATEMENT OF THE CASE

Near midnight, on September 3, 1972, Kentucky State Policemen Leroy Thompson and Alexander Collins, were responding to a drunk complaint in the Busy area of Perry County, Kentucky. During their stay in this area a red '61 Chevrolet pickup truck equipped with a camper top drove past their cruiser. According to the officers, they observed that it had defective tail lights and a loud muffler. Their blue rotating beacon was turned on and the truck stopped immediately. Petitioner, Joe Lewis, was driving the truck. At the request of the officers, Joe Lewis displayed his drivers license.

One of the officers testified at a preliminary hearing in Perry County that as they approached the rear of the truck they observed through the rear window of the camper boxes with the words "Danger — Electrical Blasting Caps" printed thereon. Printed on the rear of the bed of the truck were the words "General Construction Company". Apparently based upon this observation, and the hour of the night the officers ordered both petitioners out of the truck, patted them down and placed them in their cruiser. One of the officers requested petitioner, Lewis, to open the rear doors of the camper. He refused and informed them that if they wanted it open to open it themselves. Trooper Collins remained in the cruiser with the arrestees while Trooper Thompson forced open the rear of the camper and examined the

contents of the boxes. He found electrical blasting caps. He then searched the cab of the truck and removed two 22-caliber rifles, a tire tool and a pair of bolt cutters.

After daylight other officers commenced a search of the area to determine whether or not there had been a burglary of a powder magazine. Within a few hours they discovered that the R. C. Durr magazine near Dry Hill in Leslie County, Kentucky, had been burglarized and that several hundred dollars worth of electrical blasting caps had been removed therefrom. The caps removed from the truck in which petitioners were riding were identified as having been removed from the R. C. Durr magazine.

These facts gave rise to three separate criminal proceedings being instituted against petitioners. The first was in the Perry Circuit Court wherein they were indicted for "possession of burglary tools" (i.e., the bolt cutters and tire tool). The second in the Leslie Circuit Court for "breaking and entering the R. C. Durr Construction Company powder magazine" by the use of the tire tool and bolt cutters; and the third for violation of 18 USC 842(h). Denying the existence of probable cause at the time of the arrest, search and seizure, motions to suppress were filed in each of the three courts, all of which were summarily overruled.

The petitioners were found not guilty for possession of burglary tools by a jury of the Perry

Circuit Court. During the trial the Commonwealth attempted to prove by Agent Hatton, State policemen Jarvis and Thompson, that the tire tool and bolt cutters had been used by petitioners to burglarize the warehouse. Notwithstanding the outcome of this case and notwithstanding petitioner Joe Lewis' motion for the return of the tools, they were released to ATF Agent Hatton.

Their next trial was in the Leslie Circuit Court. At that trial, and over petitioners' objections, the Commonwealth attempted to prove that the tire tool and bolt cutters had been used to burglarize the R. C. Durr magazine. Petitioners were convicted of this offense and sentenced to one year in the state penitentiary. They appealed this conviction to the Court of Appeals of Kentucky and obtained a reversal on September 27, 1974. (See Appendix, p. 27a-28a)

On December 15, 1972, an order was entered by the three Judges of the United States District Court for the Eastern District of Kentucky reassigning counties to the Catlettsburg, Lexington and Pikeville jury divisions, because ". . . the disposition of the business of the Court may be more expeditious and for other reasons deemed practical. on and after January 2, 1973 . . .". (See Appendix, p. 29a-30a)

Thereafter an order was entered transferring this cause from the Pikeville Division to the Lexington Division for trial. Petitioners objected to this transfer

and sought to stay all proceedings except their trial in the Jackson Division. (See Appendix, p. 31a-33a)

This motion was summarily overruled and trial conducted at Lexington which resulted in a hung jury. The case was then reassigned to Pikeville for a second trial, resulting in their conviction. At each of these trials the Government, over petitioners' objections, sought to prove through the same witnesses they had used in the Perry and Leslie Court cases that the tire tool and bolt cutters had been used by petitioners in burglarizing the R. C. Durr powder magazine.

ARGUMENT

I. THE WRIT SHOULD ISSUE BECAUSE THE INITIAL SEARCH AND SEIZURE BEING A PURELY STATE MATTER THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND RULE 19(1)(b) OF THIS COURT REQUIRES THIS COURT'S ADHERENCE TO THE DECISION OF THE COURT OF APPEALS OF KENTUCKY IN THE CASE OF COMBS AND LEWIS V. COMMONWEALTH OF KENTUCKY, KY. 516 S.W.2d 105.

On September 27, 1974, the Court of Appeals of Kentucky in the case of *Combs, et al* v. *Commonwealth of Kentucky,* Ky. 516 S.W.2d 105, reversed the conviction of the Leslie Circuit Court. In that proceeding, as in this, the Court had permitted the introduction into evidence of the tire tool, bolt cutters and electrical blasting caps seized from the camper. Their conviction was reversed because that Court felt

that large boxes in the camper labeled "danger — electrical blasting caps" did not constitute probable cause. As required by the Fourth Amendment of the Constitution of the United States of America and Section 10 of the Constitution for the Commonwealth of Kentucky.

Eleven days later the United States Court of Appeals for the Sixth Circuit arrived at an entirely different result. We submit that this holding is erroneous for these reasons:

(1) Though the large marked boxes were in plain view and had the words "electrical blasting caps" printed thereon there was no evidence that the boxes actually contained stolen electrical blasting caps. The fact that they contained caps was not discovered until they had forced open the camper. The fact that the caps were stolen was not discussed until the next morning. We therefore submit that the most the officers had at the time of the opening of the camper was mere suspicion. As said by this Court in the case of *Brinegar* v. *United States,* 338 U.S. 160, 175, "Probable cause means 'more than bare suspicion.' * * * * It means 'a reasonable ground for belief of guilt'." In discussing probable cause this Court held in the case of *Carroll* v. *United States,* 267 U.S. at 162 "Probable cause exists where 'the facts and circumstances within their (the Officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves

to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

(2) The Sixth Circuit rejected the warrantless search of the camper as an incident to an arrest for the traffic violation. It upheld it, however, on the basis of the arrest for possession of burglary tools. The burglary tools were not discovered until:

(a) Petitioners had been placed in the cruiser;

(b) The trooper had forced open the camper and found electrical blasting caps in the boxes;

(c) They then searched the cab and found the burglary tools;

(d) Petitioners were found not guilty by the Perry Circuit Court of possession of burglary tools.

(3) Assuming arguendo that probable cause existed for the warrantless search there were no exigent circumstances. Petitioners had previously been placed under arrest and in the police cruiser. Other officers had been called and were present in the area. Surely they had time to secure a warrant.

We therefore submit that the officers lacked probable cause and that the conclusion arrived at by the Court of Appeals of Kentucky is the proper ruling to be applied to this factual situation. But if probable cause actually existed we feel that the facts of this case, and the Tenth Amendment to the Constitution

of the United States of America would require this Court to adopt the ruling of the Court of Appeals of Kentucky. It should be remembered that the stop, search and seizure were executed by Kentucky officers in Perry County for the alleged violation of Kentucky offenses. All of this is strictly state matters. Evidence of the federal violation occurred after the illegal intrusion.

We further submit that the Perry Circuit Court's holding that the tire tool and bolt cutters were not burglary tools was binding not only on the state courts, but upon the District Court and this evidence should have been excluded under the doctrine of Collateral Estoppel. We further submit that petitioners were denied a fair trial by the continued assertions by government witnesses that these tools were used to burglarize the R. C. Durr powder magazine.

II. THE WRIT SHOULD ISSUE BECAUSE PETITIONERS' SIXTH AMENDMENT RIGHTS WERE VIOLATED IN NOT TRYING THEIR CASE AT THE JACKSON DIVISION OF THE COURT.

Our founding fathers had felt the sting of oppression and tyranny by the Crown's willy-nilly transfer of criminal trials. They complained of this in the "DECLARATION OF INDEPENDENCE". To make sure that the citizens of this new nation would be free from similar oppression by their new

government they inserted two provisions in the Constitution. Article 3, §2, para 3 provides that "The trial of all crimes * * * *, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; * * * *". Article 6 of the Amendments provides "In all criminal prosecutions the accused shall enjoy the right to a speedy trial * * * * by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * *". What has been done by the Congress and the rule making authority of this Court to carry out these requirements?

First Congress has said in 28 USC 97(a) "Court * * * * shall be held at * * * * Jackson." Jackson is only 30 miles from where the alleged incident occurred and where petitioners and their witnesses resided. Yet the Trial Court refused to try petitioners at Jackson. This Court in the case of *Rosencrans* v. *United States,* 17 S. Ct. 302, 165 U.S. 257, 41 L. ed 708 said:

> "The creation of divisions and the multiplication of places of trial are for the convenience of litigants, bringing the trial nearer to them and their witnesses."

Again in the case of *United States* v. *Johnson,* 323 U.S. 273, 276, 89 L.ed 236, Judge Frankfurter eloquently stated the precept when he said:

> "Questions of venue in criminal cases * * * * are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

This is not all Congress has done to ascertain the place of trial. It enacted 18 USC 3240. This required a trial to be held in the original district or division if the county or territory had been transferred after the commission of the alleged offense. Here Perry County was transferred to the Pikeville Division on January 3, 1973. It would appear to us that the statute is plain and that this alone would require the Court to conduct the trial at Jackson.

More recently Congress enacted the Jury Selection Act. 28 USC 1861. That statute set forth the policy of this nation that all litigants in federal courts entitled to a jury trial should have the right to a petit jury selected at random from a fair cross-section of the community. This Court recently in the case of *Taylor* v. *State of Louisiana*, No. 73-5744, decided January 21, 1975, in discussing the Jury Selection Act stated:

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the

> Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

This Court reversed the Taylor conviction because the jury was not composed of a cross-section of the community wherein the Court convened. Not only were we denied trial by a jury drawn from a fair cross section of the community, we were even denied a trial in the community of the Jackson Division of the District Court.

There is yet another mandate dealing with place of trial. FRCP 18 authorizes the Court to fix the place of trial within the district, but it must give due regard to the convenience of the defendant and witnesses. The order entered during each of these transfers was entered ex parte. At no time were petitioners given an opportunity to be heard prior to the transfers. The Court assigned as reason for the transfers the speedy trial requirement of the Sixth Amendment. We submit that the Sixth Amendment has other requirements equally as important to an accused. His right of counsel, witnesses and the place of trial are equally as important and should be balanced together.

The Fifth Circuit in the case of *Dupoint* v. *United States*, 388 F. 2d 39, 44, in discussing this rule said:

> "* * * * it is not to be done except with due regard for the defendant's convenience and that of the witnesses. The convenience of the Government is not a factor. As evidenced by the Constitutional requirement that none shall be prosecuted outside the district in which the offense is committed, it is the public policy of this Country that one must not arbitrarily by sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government."

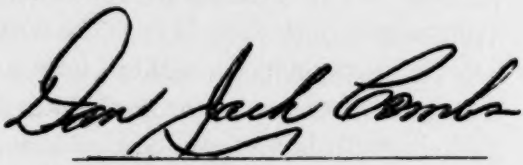
The Courts below rejected each of these — place of trial arguments — by simply holding that because

the word "division" was not used by Congress in 28 USC 97(a) that the rules and statutes were not applicable to the case at bar. It is true that other circuits have arrived at a similar conclusion for the same reasons. But we submit that this reasoning is fallacious. The word "division" has no magical connotation. It is synonymous with "the place where the Court convenes". Congress had said that the Eastern District Court should convene at Jackson. The lower Court held that "The District Court did not violate appellants rights secured by Rule 18 in trying them at Lexington and Pikeville instead of at Jackson." Rule 18 gave petitioners no rights. The only rights we have are natural rights and those guaranteed by the Constitution. This rule, however, requires the Courts to recognize those rights and afford them a trial at a place within the district with due regard to their convenience and their witnesses.

CONCLUSION

For these reasons we respectfully urge the Court to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and to rectify the grievous constitutional errors committed by that Court.

Respectfully submitted,



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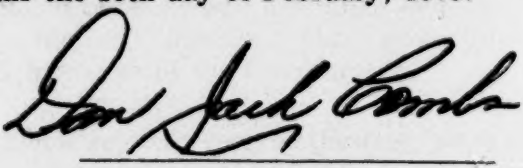
CERTIFICATE OF SERVICE

Pursuant to U. S. Sup. Ct. Rule 33 (3), I hereby certify that two copies of the foregoing Petition for Writ of Certiorari was mailed to the Honorable Eugene E. Siler, Jr., United States Attorney, P. O. Box 1490, Lexington, Kentucky 40501, Attorney for Respondents, this the 10th day of February, 1975.



Dan Jack Combs